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IN THE

Supreme Court of the United States

October Term, 1963.

No. 276

EASTERN AIR LINES, INC.,
GENERAL MOTORS CORPORATION and
LOCKHEED AIRCRAFT CORPORATION,
Petitioners,

v.

DOROTHY WEINSTEIN, Extrx., etc.,
MARY B. GRICE, Extrx., etc.,
DIANE BRAFF, Admx., etc.,
THELMA P. FREEMAN, Extrx., et al., etc.,
EDNA E. LONG, Admx., et al., etc.,
ATTILIO E. ABATE, Admr., etc.,
JOSEPH THOMPSON, JR., Admr., etc.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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OCTOBER TERM, 1963.

No.

EASTERN AIR LINES, INC.,
GENERAL MOTORS CORPORATION AND
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Petitioners

v.

DOROTHY WEINSTEIN, EXTRX., ETC.,
MARY B. GRICE, EXTRX., ETC.,
DIANE BRAFF, ADMX., ETC.,
THELMA P. FREEMAN, EXTRX., ET AL., ETC.,
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ATTILIO E. ABATE, ADMR., ETC.,
JOSEPH THOMPSON, JR., ADMR., ETC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Eastern Air Lines, Inc., General Motors Corporation and Lockheed Aircraft Corporation pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Opinion of District Judge Van Dusen directing the dismissal of the libels in these actions is reported *sub nom. Weinstein v. Eastern Airlines, Inc.*, at 203 F. Supp. 430 (E. D. Pa. 1962), and is printed as Appendix A to this Petition. The Opinion of the United States Court of Appeals for the Third Circuit, per Chief Judge Biggs, reversing in part and affirming in part is reported *sub nom. Weinstein v. Eastern Airlines, Inc.*, at 316 F. 2d 758 (3 Cir. 1963) and is printed as Appendix B to this Petition.

JURISDICTION

The Opinion of the United States Court of Appeals for the Third Circuit was filed on April 26, 1963 (Appendix B) and the Judgment of the Court of Appeals was filed on April 26, 1963 (Appendix C). The jurisdiction of this Court to review the decision below by writ of certiorari is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Tort claims for wrongful death from the crash in territorial waters of Massachusetts of a land-based airplane en route from Boston to Philadelphia are not within the admiralty or maritime jurisdiction of the United States District Court as conferred by the Judicial Code.

STATUTE INVOLVED

Section 1333 of the Judicial Code, as amended, 62 Stat. 931, 28 U. S. C. A. § 1333, provides in pertinent part as follows:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

STATEMENT OF THE CASE.

On October 4, 1960, a land based Lockheed Electra airplane crashed into the navigable waters of Boston Harbor, in Massachusetts shortly after its takeoff from Logan International Airport in Boston on a scheduled flight to Philadelphia, Pennsylvania. Passengers and crew members were killed and injured as a result of the crash.

Personal representatives of seven of the deceased passengers filed libels[1] in the United States District Court for the Eastern District of Pennsylvania against Eastern Air Lines, Inc., General Motors Corporation, Lockheed Aircraft Corporation and the United States of America, claiming a right to recover in admiralty.[2]

In substance, each of the libels sets forth two theories of action: one sounding in tort based on negligence, the other sounding in contract based on breach of alleged warranties.

Exceptions to the libels were filed by Petitioners herein on the grounds that the claims asserted were not within the jurisdiction of a court sitting in admiralty. After ex-

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1 All of the libellants herein have instituted civil actions in the United States District Court for the Eastern District of Pennsylvania against all three of the petitioners herein to recover for the wrongful deaths of their respective decedents alleging essentially the same facts and theories and relying on the same statutes as set forth in the libels. These civil actions are still pending and are the subjects of writs of certiorari granted by this Court on April 15, 1963 to the United States Court of Appeals for the Third Circuit in Petitions numbered 50 and 89, October Term, 1963 to review the question of the transfer of those and related actions from the Eastern District of Pennsylvania to the District of Massachusetts.

2 Libellants having relied upon the Federal Tort Claims Act, 28 U. S. C. A. §§ 1346(b), 2402, 2671-2680, as the basis for their actions against the United States, the District Court dismissed the actions as to the United States, since said Act gives federal district courts jurisdiction of civil actions, but not of suits in admiralty. The opinion of District Judge Van Dusen is reported *sub nom. Weinstein v. United States* at 200 F. Supp. 438 (E. D. Pa. 1961). No appeal was taken therefrom.

tensive oral argument and careful consideration of the briefs and other matters submitted by the parties, Judge Van Dusen on March 19, 1962, filed an opinion and entered an order sustaining respondents' exceptions and dismissing the actions.

Judge Van Dusen held that, as to tort claims, "in the absence of statute, a maritime locality plus some maritime connection is necessary for admiralty jurisdiction", and further that "admiralty jurisdiction does not encompass causes of action resulting from crashes of airplanes into the navigable waters of a state . . . ."

With regard to the claims based on breach of contract and warranty, Judge Van Dusen pointed out that "[T]he traditional criterion of admiralty jurisdiction as to contracts is whether the contract is maritime, having reference to maritime service or maritime transactions". As to the alleged contracts between libellants' decedents and respondents, it was held that such contracts "had no maritime aspects at all".

The Court of Appeals held "that the court below was in error as to the issue of tort jurisdiction but was correct as to the allegedly maritime contracts herein involved". In reversing on the issue of tort jurisdiction, the Court of Appeals relied on the broad language of *The Plymouth*, 70 U. S. [3 Wall.] 20 [1865], and held that "[i]f the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required." In holding that admiralty tort jurisdiction requires more than mere "locality", the District Court looked to this Court's opinion in *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36 (1943), and to the opinion of District Judge Dawson in *McGuire v. City of New York*, 192 F. Supp. 866 (S. D. N. Y. 1961). Petitioners herein seek review only of that part of the decision below which relates to the question of admiralty tort jurisdiction.

REASONS FOR ALLOWING THE WRIT.

I. The Decision Below Is in Conflict With the Decision of Another Court of Appeals and With Decisions of Other Federal Courts on the Same Subject.

In holding that locality is the sole test of admiralty tort jurisdiction, the decision of the court below stands in bold conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of *Campbell v. H. Rackfeld & Co.*, 125 F. 696 (9 Cir. 1903). There a longshoreman brought suit in admiralty against a stevedore for injuries received while unloading a cargo of coal from a vessel anchored in the navigable waters of the port of Honolulu.

The District Court had dismissed the libel for want of admiralty jurisdiction, and the Court of Appeals affirmed, holding that, while locality remains a test of admiralty tort jurisdiction, it was by no means the only test. The court said at page 697:

> "The fundamental principle underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist, for the all-sufficient reason that the admiralty does not concern itself with non-maritime affairs.
>
> . . . . . .
>
> Torts, as well as contracts, not maritime, are outside of admiralty cognizance."

The narrow holding of the *Campbell* case—that an injury to a longshoreman sustained while unloading a vessel in navigable waters does not give rise to a cause of action cognizable in admiralty—was, of course, vitiated by this Court's later holding in *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52 (1914), where it was held that such an action was within the admiralty and maritime jurisdiction.

Of compelling significance, however, is the fact that this Court in the *Imbrovek* case specifically refused to decide the question of whether or not a maritime connection was required to support tort jurisdiction in admiralty. Rather the Court held that if such a connection was necessary it was nevertheless present in that case. The court stated at 61 as follows:

> "As this court has observed, the precise scope of admiralty jurisdiction is not a matter of 'obvious principle of of very accurate history', *The Blackheath, supra.* And we are not now concerned with the extreme cases which are hypothetically presented. Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction."

Accordingly, therefore, the broader holding of the *Campbell* case,—that a maritime connection as well as a maritime location is necessary for admiralty tort jurisdiction—still stands as the rule of law in the Ninth Circuit.

In the Second Circuit there is a different view on what gives rise to admiralty tort jurisdiction. There the locality test has been abandoned altogether even as a rule of exclusion. Cases in the Second Circuit regard the maritime nature of the tort as the sole criterion regardless of where the negligent conduct or the injury occurs.

In *Castillo v. Argonaut Trading Agencies, Inc.*, 156 F. Supp. 398 (S. D. N. Y. 1957), the court held that admiralty had jurisdiction in a case for false imprisonment of seamen on land. Recognizing that the rule may be different elsewhere, the opinion states:

> "Respondents argue that admiralty has jurisdiction only of torts committed on navigable waters or, at the very least, on board a vessel. Since the libel contains

no allegation that the imprisonment occurred within these locations, respondents state the libel must be dismissed for lack of admiralty jurisdiction.

"There is no doubt that a long line of cases had enunciated this 'physical locality' rule of admiralty jurisdiction. In fact, the last vestige of this rule was recently applied by the Third Circuit in a case involving false imprisonment. Forgione v. United States, 3 Cir., 202 F. 2d 249. *But the rule has been completely abrogated in this circuit.*" (Emphasis supplied.) (p. 400)

Judge Dimock noted that the false imprisonment arose out of a dispute relating to conditions on the vessel. Assuming this to be true, it was held that the tort had a direct relationship to the operation of the vessel, and thus admiralty had jurisdiction.

In *Mekiniri v. City of New York*, 192 F. Supp. 866 (S. D. N. Y. 1961), it was held that admiralty had no jurisdiction over a claim by a bather for injuries sustained while bathing in navigable waters. The Court there stated at 870-871 as follows:

"Not every tort committed on admiralty waters may be redressed in the admiralty courts. Only those which have a maritime character, which deal with a maritime subject matter, are properly within admiralty jurisdiction."

Thus, both the Third Circuit and the Ninth Circuit stand in conflict with the Second Circuit, and the Third Circuit and Ninth Circuit stand in conflict with each other.

The current uncertainty as to the proper test for admiralty tort jurisdiction is further reflected in *King v. Testerman*, 214 F. Supp. 335 (E. D. Tenn. 1963). That case was an action in admiralty to recover for personal injuries sustained in a water skiing accident which happened on Fort London Lake in Tennessee. The court stated at 335 and 336 as follows:

> "As indicated at various times during this trial, the Court has had considerable trouble with the question of jurisdiction. There was no collision. No boat was libeled. The accident did, however, take place on navigable waters and a boat was being used as a tow in the skiing accident which resulted in the injury. The operator was charged with negligence in its handling. The concurrence of the use of a boat in connection with the accident and the fact that it occurred on navigable waters constrains the Court to the belief that admiralty jurisdiction is thereby established. But the matter is by no means free from doubt."

The conflict of views in the various circuits as well as the general uncertainty about admiralty tort jurisdiction are strong reasons for this Court to review the decision below and to enunciate the proper test to be applied throughout the federal judicial system.

II. The Court Below Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.

Despite the broad language of some of the cases, the decision of the court below presents a question which has never been decided by this Court. Are all injuries, of whatever nature and quality, which occur in or upon navigable waters within the admiralty and maritime jurisdiction of the federal courts? That they are is, of course, the clear impact of the holding below.

Stated another way, petitioners now respectfully urge this Court to resolve what has become known as "Mr. Benedict's celebrated doubt".[3] Does not admiralty tort juris-

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3. So denominated by Judge Hough in *"Admiralty Jurisdiction—Of Late Years"*, 37 Harv. L. R. 529 (1924).

The most recent restatement of Mr. Benedict's query appears at Page 351 of Volume 1, of his treatise *"Benedict on Admiralty"*, Sixth Edition, 1940, as follows:

> "It has nevertheless been doubted whether the civil admiralty jurisdiction, in cases of tort, does not depend upon the relation

diction depend upon some maritime connection over and beyond the mere place of injury?

Since the days of *The Plymouth*, *supra*, courts have made statements to the effect that admiralty tort jurisdiction depends upon the locality of the occurrence. For, almost as long, the broad statement contained in *The Plymouth* has been questioned.[3] Furthermore, the so-called rule of *The Plymouth* itself is of doubtful authority in view of this Court's subsequent opinion in *Atlantic Transport Co. v. Imbrovek*, *supra*. In that case, the only one in which the Court has had before it the specific issue here presented, the Court declined to rule on the question, thus leaving the "doubt" unresolved. This Court noted that many had argued that admiralty tort jurisdiction is not solely dependent upon locality, but requires a maritime connection as well. Assuming that there was such a requirement, it was held that the facts of that case presented a sufficient maritime connection.

Two years later, this Court decided *The Raithmoor*, 241 U. S. 168 (1916). The question there at issue was whether or not a collision between a vessel and a partially completed navigational beacon in the navigable waters of

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of the parties to some ship or vessel and embrace only those tortious violations of maritime right and duty which occur in relation to vessels to which the admiralty jurisdiction in cases of contract applies. If one of several landsmen bathing in the sea should assault or maltreat or rob another, it has not been held that admiralty would have jurisdiction of an action for the tort."

3. E.g., Mr. Benedict's doubt appeared at least as early as the fourth edition of his treatise, *Benedict on Admiralty*, which was copyrighted in 1910, and may have appeared in earlier editions.

Further, Justice Henry Billings Brown, in an article appearing two years after he retired from the bench of this Court, stated the following regarding the locality rule:

"Whether the word 'tort' as thus used includes every act within the common law definition of the word, or is confined to such as are in some way connected with the equipment, navigation or discipline of the ship, has not been judicially decided." 9 Col. L. R. 1 (1908).

the Delaware River gave rise to a cause of action in admiralty. In holding in favor of jurisdiction, the Court, per Justice Holmes, said, at page 176:

> "'It was in course of construction in navigable waters, that is, at a place where the jurisdiction of admiralty in cases of tort normally attached,—*at least in all cases where the thing was of a maritime character.*'" (Emphasis added.)

In *The Admiral Peoples*, 295 U. S. 649 (1935) this Court held that there was admiralty jurisdiction where a disembarking passenger fell from a gangplank and sustained injuries when she landed on the dock. There it was noted at 651:

> "That [admiralty] jurisdiction in cases of tort depends upon the locality of the injury. It does not extend to injuries caused by a vessel to persons or property on land."

In finding admiralty jurisdiction, this court further stated at 652:

> "Neither the short distance that she fell nor the fact that she fell on the dock and not in the water, alters the nature of the cause of action which arose from the breach of duty owing to her while she was still on the ship and using its facility for disembarking."

It was there contended that admiralty was without jurisdiction because the injury occurred on the land. However, the opinion indicates that admiralty jurisdiction in torts turns on the "inception" of the cause of action and not upon where the injury occurred. The Court cited with approval and quoted from *The Strabo*, 98 Fed. 998 (2 Cir. 1900) as follows:

> "It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the stringpiece of the wharf or in the water."

Conversely, it should not be of vital importance to admiralty jurisdiction in the instant cases that the airplane crashed into the harbor and not upon the immediately adjacent land.

Although this Court and the lower courts have frequently spoken in terms of locality as the criterion for tort jurisdiction in admiralty, in all those cases where admiralty jurisdiction was held to be present, there was some strong maritime connection.[5]

The significance of the decision below to future litigation in the federal courts is great. If the holding of the court below is correct, the federal district courts will be open for claims without regard to diversity of citizenship or the amount in controversy whenever an injury is sustained upon any body of water which is navigable in fact. Presumably federal jurisdiction would apply whether the claim was for personal injury or property damage so long as the injury or damage occurred upon or in navigable waters and without regard to how the injury or damage occurred.

Although the admiralty and maritime jurisdiction of the district courts has been enlarged from time to time this

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5. See, e.g., *Atlantic Transport Co. v. Imbrovek*, *supra* (stevedore injured on board vessel); *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469 (1922) (carpenter injured while on board uncompleted vessel); *Kermarec v. Compagnie Generale Transatlantique*, 358 U. S. 625 (1959) (fall on ship); *Hess v. United States*, 361 U. S. 314 (1960) (drowning when boat sank); *Fireman's Fund Ins. Co. v. City of Monterey*, 6 F. 2d 893 (N. D. Cal. 1925) (collapse of dock); *The City of Lincoln*, 25 Fed. 835 (S. D. N. Y. 1885) (collapse of wharf); *Dean v. Chesapeake Bay Ferry District*, 158 F. Supp. 408 (E. D. Va. 1958) (injury to passenger on board ferry). Other cases upholding admiralty jurisdiction have had similar maritime connections. See, e.g., *Great Lakes Dredge & Dock Company v. Kierejeski*, 261 U. S. 479 (1923) (worker injured on vessel); *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575 (1943) (inspector killed while climbing on ladder of vessel). The existence of a maritime connection in those cases has generally been noted. E.g., 1 American Jurisprudence, Admiralty 570, Section 42 states in part

> "The jurisdiction of courts of admiralty over torts generally seems to depend upon two tests, viz., the locality of the injury, and the maritime nature of the tort."

has been by statutes such as the Admiralty Extension Act[6] and the Death on the High Seas Act.[7] Whether the jurisdiction of those courts should extend to all claims arising out of air commerce and if so, whether such claims should be subject to the principles and procedures of admiralty law are questions for Congress to deal with.

Congress has already indicated that federal policy recognizes a distinction between air commerce and maritime commerce. Congress has plainly decided, in the Federal Aviation Act of 1958, 49 U. S. C. A. § 1301-1542, and by the rules and regulations of the Civil Aeronautics Board and the Federal Aviation Administration made pursuant to the Act, that the federal interest in air commerce is in its orderly and uniform governance by the policies set forth therein. Section 1509(a) of Title 49 of the United States Code specifically provides that laws of the United States relating to navigation and shipping, including the rules for

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6. 62 Stat. 496, 46 U. S. C. A. § 740 (1948). Prior to the Admiralty Extension Act, it was held that admiralty had no jurisdiction over a claim for death by drowning of a bridge tender who was jarred into the navigable waters of a canal when a vessel struck the bridge. Thus in *Oakes v. United States*, 35 F. Supp. 808 (E. D. N. Y. 1940), the court stated at 809:

> "The mere fact that libellant's decedent came to his death by drowning within the water does not change the nature of the tort."

Since the Admiralty Extension Act (and solely because of said act) such a claim would fall within the admiralty jurisdiction of the United States district courts.

7. 41 Stat. 537, 46 U. S. C. A. § 761. The Death on the High Seas Act creates a cause of action for wrongful death on the high seas and provides that any such cause of action is within the admiralty jurisdiction of the federal district courts. This Act has been construed to apply to all wrongful deaths occurring on the high seas irrespective of any maritime connection. Had admiralty jurisdiction under the Judicial Code extended to all torts occurring on navigable waters, there would, of course, have been no need in the Death on the High Seas Act for the grant of admiralty jurisdiction to the federal district courts. The Death on the High Seas Act does not apply to deaths occurring within one marine league of the shore.

the prevention of collisions, shall not apply to aircraft, with the exception of the international rules relating to navigation on the high seas set forth in 33 U. S. C. A. §§ 143-147(d). Section 143 of Title 33 of the United States Code specifically provides that those excepted rules shall not apply to aircraft in territorial waters.

The application of admiralty jurisdiction to this crash of an aircraft in territorial state waters would squarely conflict with this strong federal policy in the uniform regulation of air commerce. In the same libel in which libellants specify the acts or omissions of petitioners herein, it is also alleged that the Civil Aeronautics Board and the Federal Aviation Agency, among other things, negligently certified the aircraft and its power plants, failed to require the aircraft and its power plants to undergo proper and adequate tests, and failed to require that proper and adequate measures be taken against the hazard of bird ingestion. To the extent that petitioners may rely on the fact that they were governed by and complied with the rules and regulations of these agencies, governing this subject matter through admiralty jurisdiction would be contrary to the express policy of Congress.

CONCLUSION.

These cases should be reviewed by this Court because the opinion below is in direct conflict with the holdings in other circuits. Affecting as it does the very basis of admiralty tort jurisdiction, the rule of law must be uniform throughout the land.

Further, whether or not locality forms the sole test of admiralty tort jurisdiction under Section 1333 has never been squarely decided by this Court. The world of commerce has seen many changes since the issue here presented was left open in the *Imbrovek* case in 1914. Congress has clearly recognized the distinction between air and water commerce by the enactment of separate statutes regulating and governing each of them. In view of the im-

portance of this most basic question of federal jurisdiction, the decision of the Court of Appeals should be reviewed by this Honorable Court.

For these reasons, petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States District Court for the Eastern District of Pennsylvania

(Filed March 19, 1962)

VAN DUSEN, *District Judge*

On October 4, 1960, a Lockheed Electra land-based airplane crashed in the harbor of Boston, Massachusetts shortly after its take-off from Logan International Airport, Boston, Mass., on a scheduled flight to the International Airport of Philadelphia, Pa. Passengers and crew members were killed and injured as a result of the crash.

The libels filed in these seven cases all allege the liability of Eastern Airlines, Inc. on two broad theories of action. First, it is alleged that respondent Eastern Airlines, Inc. was negligent in its maintenance, operation and control of the airplane. Second, it is alleged that respondent Eastern Airlines, Inc. breached an alleged warranty that the airplane was safe, airworthy and fit to be used as a common carrier for hire by air and breached the contract and warranty to provide safe and airworthy transportation.

Admiralty jurisdiction of the court is invoked by libellants on the ground that the aircraft crashed into the navigable waters of Boston Harbor shortly after the aircraft had become airborne following take-off.

I. ADMIRALTY JURISDICTION DOES NOT ENCOMPASS TORTIOUS CAUSES OF ACTION ARISING FROM CRASHES OF AIRPLANES INTO THE NAVIGABLE WATERS OF A STATE.

The admiralty jurisdiction of this court is set forth in 28 U. S. C. A. § 1333, which provides that District Courts "shall have original jurisdiction of: (1) any civil case of

admiralty or maritime jurisdiction. . . . ". The admiralty or maritime jurisdiction referred to is pursuant to Article III, § 2, Clause 1, of the Constitution of the United States of America.

There is no dispute that the landmark case is *The Plymouth*, 70 U. S. (3 Wall.) 20 (1865). The court stated at page 36:

> "The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

In spite of the foregoing broad statement, research has failed to disclose any case where it has been held that admiralty had jurisdiction simply because an airplane, as opposed to a seaplane, crashed into the navigable waters of a state.

The rule of *The Plymouth*, supra, decided in 1865, was stated without any consideration of air travel.

As stated in Mr. Benedict's treatise on admiralty,

> "It has nevertheless *been doubted whether the civil admiralty jurisdiction, in cases of tort, does not depend upon the relation of the parties to some ship or vessel and embrace only those tortious violations of maritime right and duty which occur in relation to vessels* to which the admiralty jurisdiction in cases of contract applies. If one of several landsmen bathing in the sea should assault or imprison or rob another, it has not been held that admiralty would have jurisdiction of an action for the tort." 1 Benedict on Admiralty 351. (Emphasis supplied.)

Libellants contend that, in determining whether or not the nature of the tort was maritime in nature and, there-

fore, subject to federal admiralty jurisdiction, the courts have adhered strictly to the criterion of "locality."

The opinion of District Judge Dawson in *McGuire v. City of New York*, 192 F. Supp. 866 (S. D. N. Y., 1961), sets forth a complete and learned discussion of the nature of admiralty and maritime jurisdiction. Here libellant alleged that she was injured while bathing in the waters of New York Harbor. The court had to decide whether an injury to a bather at a public beach occasioned by the negligence of the proprietor of the bathing beach constitutes a cause of action cognizable in admiralty. The court stated at page 868:

> "While it has been urged that admiralty has jurisdiction over all torts where the wrong takes place on the high seas or other public navigable waters of the United States, *this position has not been adopted either by the text writers or by the courts. The basis for admiralty jurisdiction must be a combination of a maritime wrong and a maritime location.* A maritime wrong generally has been concluded to be one which in some way is involved with shipping or commerce." (Emphasis supplied.)

Footnote 3 of this opinion states:

> "In addition to the requirement of locality, there is a continuing undercurrent which requires that the controversy have a maritime nexus. The tort must arise from a maritime transaction, or be of a maritime nature, or deal with a maritime subject matter. As far as this Court is able to determine, all the cases in which admiralty jurisdiction has been accepted, have in fact dealt with a maritime subject matter. See, Note, 16 Harv. L. Rev. 210 (1903)."

In the course of its discussion, the court stated at pages 870-1 that:

"*Not every tort committed on admiralty waters may be redressed in the admiralty courts.* Only those which have a maritime character, which deal with a maritime subject matter, are properly within admiralty jurisdiction. Admiralty jurisdiction originates from the early customs of the sea which were adopted in principle as law by commercial peoples. Admiralty was the result of commerce on the high seas; the commerce made possible by sailing vessels. Just as vessels were the source of admiralty, they remain the focal point of admiralty jurisdiction. In very general terms, admiralty jurisdiction relates to things occurring on or to vessels or as a result of the employment of vessels." (Emphasis supplied.)

In Benedict's treatise, it is said:

"Maritime causes naturally center around the ship, the great agent of maritime enterprise and affairs. . . ." 1 Benedict, Admiralty, 61 (6th Ed. 1940).

Similarly, Robinson has said:

"Transactions are maritime only when connected with a vessel." Robinson, Admiralty, 8 (1939).

He continues:

"Merely because events occur upon navigable waters does not put them within the admiralty and maritime jurisdiction. Transactions are 'maritime' only when in some way connected with a 'vessel'. . . ."

The better rule would require some maritime connection over and beyond the fact that the injury occurred on navigable waters.[1] Many opinions look at not only the "locality test," but also to any "maritime connections."

[1] There are cases where admiralty jurisdiction was held present although the injury did not happen on navigable waters, but the injury was found to have arisen out of maritime activity. In *Castillo v. Argonaut Trading Agency*, 156 F. Supp. 378 (S. D. N. Y. 1957), the court stated that admiralty jurisdiction is not based alone on the place

As stated in *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36 (1943), at pages 42-3:

> "... admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

In *Forgione v. United States*, 202 F. 2d 249, 252-3 (3rd Cir. 1953), the court took the position that for a tort to be a maritime tort the injury must occur on navigable waters. But, as shown in *McGuire v. City of New York*, *supra*, not every tort which occurs on navigable waters results in a maritime tort.

"Locality" as a test is a rule that quite *reasonably excludes* some torts but it does not *reasonably include* every tort. Therefore, the use of the locality test in *Forgione*, *supra*, was consistent with the rule in *McGuire*, *supra*; and does not stand for any rule that admits of admiralty jurisdiction simply because the tort occurred on navigable waters.

The better rule would seem to be that, in the absence of statute, a maritime locality plus some maritime connec-

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where the injury is inflicted. There the court held that admiralty jurisdiction existed in a claim by seamen for false imprisonment by respondent's employees which arose out of a disagreement related to conditions on board respondent's vessel on which libellants were employed. The alleged tort had a direct relationship to the operation of the vessel without regard to where the false imprisonment occurred.

2. Where jurisdiction is founded on the provisions of § 1 of the Death on the High Seas Act, 46 U. S. C. A. § 761; which creates a cause of action for wrongful death "occurring on the high seas beyond a marine league from the shore of any state," and further confers jurisdiction in admiralty upon the District Courts of the United States to hear and determine such suits, the jurisdiction is based on the statute. See *Noel v. Airponents, Inc.*, 160 F. Supp. 548 (D. N. J. 1958), aff'd 247 F. 2d 677 (2nd Cir. 1957); *Stiles v. National Airlines*, 161 F. Supp. 125 (E. D. La. 1958); *Hine v. Transocean Airlines*, 124 F. Supp. 13 (D. Hawaii 1954). These cases are not precedents for the claims being made here that admiralty jurisdiction attaches solely because the airplane crashed in Boston Harbor, since there is no allegation that the crash occurred more than a marine league from the shore.

tion is necessary for admiralty jurisdiction. Therefore, until Congress establishes such jurisdiction by statute, admiralty jurisdiction does not encompass causes of action arising from crashes of airplanes into the navigable waters of a state and these libels will be dismissed, without prejudice.[3]

II. To Confer Jurisdiction Upon Admiralty for Breach of Contract, There Must Be Some Maritime Activity Involved in the Occurrence Upon Which the Claims Are Based.

For libellants to recover upon any alleged breach of contract for the death of their decedents, there must be jurisdiction in admiralty with respect to such claims. In these libels there is no maritime contract involved between any of libellants' decedents and respondent, Eastern Airlines, Inc.

The traditional criterion of admiralty jurisdiction as to contracts is whether the contract is maritime, having reference to maritime service or maritime transactions. *James Richardson & Sons v. Connors Marine Co.*, 141 F. 2d 226 (2nd Cir. 1944).

Pacific Surety Co. v. Leatham & Smith Towing & Wrecking Co., 151 Fed. 440 (7th Cir. 1907), stated at page 443:

> "... the doctrine is settled that the contract articulated in a libel must be, directly and in essence, an obligation maritime in its nature, for the performance of maritime service or transactions, to confer jurisdiction."

While it is assumed that a contract between libellants' decedents and respondent did exist, such contract had no

3. It is noted that Civil Actions Nos. 30302 to 30307, inclusive, are pending in this District by these libellants against Eastern Air Lines, Inc. arising out of the same airplane accident. Therefore, this ruling will not deprive them of their only remedy.

maritime aspects at all. It covered a flight by land plane from one airport on land to another airport on land and there has been no showing that any substantial part of the flight was over the sea.

Since there was no maritime activity involved in the occurrence upon which the claims herein are based, there is no admiralty jurisdiction present as to the contract claims described in the libels.

ORDER.

And Now, March 19, 1962, It Is Ordered that the Exceptions of Respondent, Eastern Airlines, Inc., in the above-captioned admiralty actions are Sustained, and these actions, insofar as they have been brought against Eastern Airlines, Inc., respondent, are Dismissed, without prejudice.

s Francis L. Van Dusen, *J.*

APPENDIX B.

Opinion of the United States Court of Appeals for the Third Circuit.

(Filed April 26, 1963.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14023

DOROTHY WEINSTEIN, EXECUTRIX OF THE ESTATE OF RALPH WEINSTEIN, DECEASED,
Appellant,

v.

EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION, AND LOCKHEED AIRCRAFT CORPORATION.

No. 14024

THELMA P. FREEMAN AND PROVIDENT TRADESMENS BANK AND TRUST COMPANY, CO-EXECUTORS OF THE ESTATE OF ADDISON B. FREEMAN, JR., DECEASED,
Appellants,

v.

EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION, AND LOCKHEED AIRCRAFT CORPORATION.

No. 14025

MARY B. GRICE, EXECUTRIX OF THE ESTATE OF DAVID S. GRICE, DECEASED,

Appellant,

v.

EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION, AND LOCKHEED AIRCRAFT CORPORATION.

No. 14026

DIANE BRAFF, ADMINISTRATRIX AD PROSEQUENDUM AND AS GENERAL ADMINISTRATRIX OF THE ESTATE OF BERNARD JAY BRAFF, DECEASED,

Appellant,

v.

EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION, AND LOCKHEED AIRCRAFT CORPORATION.

No. 14027

EDNA E. LONG AND LAURA MANNEY, ADMINISTRATRICES OF THE ESTATE OF SHIRLEY E. REITE, DECEASED,

Appellants,

v.

EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION, AND LOCKHEED AIRCRAFT CORPORATION.

No. 14028

ATTILIO E. ABATE, ADMINISTRATOR OF THE ESTATE OF FREDERICK N. ABATE, DECEASED,
Appellant,

v.

EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION, AND LOCKHEED AIRCRAFT CORPORATION.

No. 14029

JOSEPH THOMPSON, JR., ADMINISTRATOR OF THE ESTATE OF LETHA MAE THOMPSON, DECEASED,
Appellant,

v.

EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION, AND LOCKHEED AIRCRAFT CORPORATION.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 6, 1962

Before BIGGS, *Chief Judge*, and STALEY, *Circuit Judge*, and LEAHY, *District Judge*

OPINION OF THE COURT

(Filed April 26, 1963)

By BIGGS, *Chief Judge*.

This appeal raises the novel and interesting question of whether an action for wrongful death arising out of the crash of an aircraft in navigable waters within one marine

league from shore lies within the admiralty jurisdiction of the United States.

At approximately five o'clock in the afternoon of October 4, 1960, Eastern Airlines Flight No. 375, a land-based Lockheed Electra aircraft, took off from Logan International Airport in Boston, Massachusetts, on a scheduled flight to Philadelphia, Pennsylvania. Shortly after becoming airborne, the aircraft crashed into the navigable waters of Boston Harbor. The libellants' decedents, passengers on board the aircraft, were killed as a result of the crash.

Libels in personam were filed in the United States District Court for the Eastern District of Pennsylvania, in admiralty, by the personal representatives of seven deceased passengers against Eastern Airlines, Inc., the owner and operator of the aircraft, Lockheed Aircraft Corporation, the manufacturer of the plane, and General Motors Corporation, the manufacturer of the aircraft's power plant.[1] The libels alleged that Eastern had been negligent in maintenance, operation and navigation of the aircraft and that Lockheed and General Motors had been negligent in the design, manufacture and inspection of the aircraft and power plant respectively, and had failed to make necessary alterations and modifications or warn Eastern of the necessity to do so. Additional allegations of breach of warranty were directed against all three respondents.[2]

1. The United States of America was originally named as a respondent in the libels. By an order of the District Court entered on December 12, 1961, these libels were dismissed as to the United States. See Weinstein v. United States, 200 F. Supp. 448 (E. D. Pa. 1961). No appeal was taken from this order and, therefore, no issue as to the liability of the United States is now before this court.

2. It was asserted in the libels that Eastern had breached its "warranty that the aircraft was safe, airworthy and fit to be used as a common carrier for hire by air" and had breached "its contract and warranty, to provide . . . safe and airworthy transportation", that General Motors had breached "its warranty that the engines, propellers and other component parts of the said aircraft furnished by it were proper, safe and suitable . . . ", and that Lockheed had breached "its warranty that the said aircraft, power plants, various component parts,

Exceptions to the libels were filed by the respondents on the grounds that the claims asserted were not within the jurisdiction of a court sitting in admiralty.

The court below sustained the respondents' exceptions and dismissed the actions in an order dated March 19, 1962, the order appealed from.[3] The court held[4] that admiralty jurisdiction in cases of tort depends "in the absence of statute, [upon] a maritime locality plus some maritime connection . . . . Therefore, until Congress establishes such jurisdiction by statute, admiralty jurisdiction does not encompass causes of action arising from crashes of airplanes into the navigable waters of a state . . . ."[5] With regard to the contract and warranty claims, the court ruled that "The traditional criterion of admiralty jurisdiction as to contracts is whether the contract is maritime, having reference to maritime service or maritime transactions."[6] The contracts in the cases now on appeal, it held, "had no maritime aspects at all".[7] We find for the reasons set out hereinafter that the court below was in error as to the issue of tort jurisdiction but was correct as to the allegedly maritime contracts here involved.

The Constitution of the United States, Article III, Section 2, provides that the judicial power of the United States shall extend to "all Cases of admiralty and maritime Jurisdiction". Statutory implementation of this constitutional

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instrumentation, furnishings, controls and structural members were safe, airworthy, proper and suitable for the carriage of passengers by a common carrier engaged in transportation by air."

3. The original order of March 19, 1962, signed by Judge Francis L. Van Dusen, referred only to the causes against Eastern Airlines, Inc. By an order entered on April 6, 1962, however, the order of March 19 was amended *nunc pro tunc* to include the causes against Lockheed and General Motors.

4. Weinstein v. Eastern Airlines, Inc., 203 F. Supp. 430 (E. D. Pa. 1962).

5. 203 F. Supp. 430 at 433.

6. 203 F. Supp. 430 at 434.

7. 203 F. Supp. 430 at 434.

grant was enacted by Congress in substantially identical terms. See 28 U. S. C. A. § 1333.[8]

The critical factor in determining whether a tort claim comes within the broad statutory grant of admiralty jurisdiction is the situs of the tort; *i.e.*, the place where it happened. If the tort occurred on navigable waters,[9] the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required. In the landmark case of The Plymouth, 70 U. S. (3 Wall.) 20, 36 (1865), the Supreme Court stated: "The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." This "locality test" has been consistently reiterated by the courts. "In torts . . . jurisdiction depends solely upon the place where the tort was committed, which must have been upon the high seas or other navigable waters." State Industrial Comm'n v. Nordenholt Corp., 259 U. S. 263, 271 (1922). "[I]t is well established that the situs of a tort determines whether or not it is maritime. In order to be maritime it must occur on navigable waters subject to admiralty jurisdiction." Forgione v. United States, 202 F. 2d 249, 252-253 (3 Cir.), certiorari denied, 345 U. S. (1953). "Admiralty jurisdiction extends to every species of tort committed upon the high seas or on navigable waters." United States v. Matson Navigation Co., 201 F. 2d 610, 613 (9 Cir. 1953). "It is clearly established that the jurisdiction of the

8. "The district courts shall have original jurisdiction . . . of:
"(1) Any civil case of admiralty or maritime jurisdiction. . . ."

9. Waters within the admiralty jurisdiction include not only the high seas but also those navigable in fact, regardless of whether or not they are subject to the ebb and flow of the tide. Insurance Co. v. Dunham, 78 U. S. (11 Wall.) 1 (1870). The waters of Boston Harbor are admittedly navigable, and therefore are within the territorial jurisdiction of admiralty.

admiralty over a maritime tort does not depend upon the wrong having been committed on board a vessel, but rather upon its having been committed upon the high seas or other navigable waters.", London Guarantee & Accident Co. v. Industrial Accident Comm'n, 279 U. S. 109, 123-124 (1929). See Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469 (1922); Atlantic Transport Co. v. Imbrovek, 234 U. S. 52 (1914); Insurance Co. v. Dunham, 78 U. S. (11 Wall.) 1 (1870); Dean v. Chesapeake Bay Ferry District, 158 F. Supp. 408 (E. D. Va. 1958); Thomson v. Bassett, 36 F. Supp. 956 (W. D. Mich. 1940); Fireman's Fund Ins. Co. v. City of Monterey, 6 F.2d 893 (N. D. Calif. 1925).[10]

The respondents take the position that admiralty jurisdiction over cases of tort depends not only upon the locus of the tort but upon a finding of some maritime connection or nexus with the alleged wrong. In other words, it is their contention that the tort must have a maritime "flavor" and that an airplane crash in navigable waters lacks this necessary element. This argument, that both locality and a

10. For additional statements of the locality test, see Philadelphia, Wilmington, & Balto. R. R. v. Philadelphia & Havre De Grace Steam Towboat Co., 64 U. S. (23 How.) 209, 215 (1859): "The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely upon locality." See also Buren v. Southern Pacific Co., 50 F. 2d 407, 408 (9 Cir. 1931): "[W]here . . . the locus of the accident is upon navigable waters, . . . this is the test of admiralty jurisdiction in cases of tort."; and Port of New York Stevedoring Corp. v. Castagna, 280 Fed. 618, 623 (2 Cir. 1922): "That the locality of a tort determines whether or not it is maritime is now so well settled that it is necessary only to refer to Atlantic Transport Co. v. Imbrovek, 234 U. S. 52 . . . ."

The test is aptly stated in 2 C. J. S. Admiralty § 59, at pp. 114-115: "The general rule is that the place of injury, namely, whether or not on the high seas or other navigable waters, determines whether or not the injury is maritime; and it has frequently been stated that it solely determines the question. The general rule that the place of injury determines its character applies irrespective of the nature and origin of the wrong or injury, of its commission on a vessel, of the place of the act causing the injury, of the maritime character of the instrument of injury or of the object injured, [or] of the relation borne by the wrongdoer to a vessel. . . ."

maritime connection are jurisdictional prerequisites, is not a new one. "It has . . . been doubted whether the civil admiralty jurisdiction, in cases of tort, does not depend upon the relation of the parties to some ship or vessel and embrace only those tortious violations of maritime right and duty which occur in relation to vessels to which the admiralty jurisdiction in cases of contract applies.", 1 Benedict, Admiralty § 427 at p. 351 (6th ed.).[11] The respondents cite Campbell v. H. Hackfield & Co., 125 Fed. 696 (9 Cir. 1903) and McGuire v. City of New York, 192 F. Supp. 866 (S. D. N. Y. 1961) as authority for their position.

In Campbell, the Circuit Court of Appeals for the Ninth Circuit held that a tort claim brought by an employee-longshoreman against his stevedore employer for personal injuries sustained while loading or unloading the hold of a vessel in navigable waters was not within the jurisdiction of admiralty. The court stated: "In the case of torts, locality remains the test, for the manifest reason that, to give an admiralty court jurisdiction, they must occur in a place where the maritime law prevails. But this is by no means saying that a tort or injury in no way connected with any vessel, or its owners, officers, or crew, although occurring in such a place or territory, is for that reason within the jurisdiction of the admiralty. On the contrary, it is . . . only of maritime contracts, maritime torts, and maritime injuries of which the United States courts are given admiralty jurisdiction." See *id., supra*, at p. 700.[12]

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11. See also Gilmore & Black, Admiralty § 1-10 at p. 22, n. 78 (1957 ed.): "It seems to be still unsettled whether any tort whatever, occurring on navigable waters, is within the jurisdiction. Certainly, the courts have used language broad enough to support this conclusion."

12. A contrary result on the same jurisdictional issue was reached by the United States Supreme Court in Atlantic Transport Co. v. Imbrovek, 234 U. S. 52 (1914), where it held that a longshoreman could maintain a tort action in admiralty against his stevedore employer for injuries sustained while working on a vessel in navigable waters. A further extension was made in International Stevedoring

In the McGuire case, *supra*, a tort action was brought in admiralty to recover for personal injuries sustained when the libellant struck a submerged object while swimming at a public beach. The court held that the subject matter of the action was outside the jurisdiction of admiralty. The court stated: "That a tort may have occurred on navigable waters is merely a prima facie test of admiralty jurisdiction . . . . . Not every tort committed on admiralty waters may be redressed in the admiralty courts. Only those which have a maritime character, which deal with a maritime subject matter, are properly within admiralty jurisdiction." See *id.*, *supra*, at p. 870.

McGuire to the contrary notwithstanding,[13] the weight of authority is clearly to the effect that locality alone determines whether or not a tort claim is within the admiralty jurisdiction. In Atlantic Transport Co. v. Imbrovek, 234 U. S. 52 (1914), the Supreme Court expressly rejected the contention that the tort must, in addition to meeting the locality test, have some connection with a vessel. "[It is contended] that a maritime tort is one arising out of an injury to a ship caused by the negligence of a ship or a person or out of an injury to a person by the negligence of a ship; that there must either be an injury to a ship or an injury by the negligence of the ship, including therein

Co. v. Haverty, 272 U. S. 50 (1926), in which it was held that Longshoremen could maintain an admiralty tort action as "seamen" under the Jones Act. The Federal Longshoremen's and Harbor Workers' Act of 1927, 33 U. S. C. A. § 901 *et seq.*, preempted the field as to direct actions by a longshoremen against his employer, but a tort action in admiralty against a third party contractor was preserved. See Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U. S. 124 (1956); Halcyon Lines v. Haenn Ship Ceiling Corp., 342 U. S. 282 (1952); Crawford v. Pope & Talbot, Inc., 206 F. 2d 784 (3 Cir. 1953).

13. The result reached in McGuire v. City of New York, 192 F. Supp. 866 (S. D. N. Y. 1961) may well be compatible with the "locality alone" test. To say that a person bathing in the shallow, and probably un-navigable in fact, waters of a public beach is within the locus of admiralty jurisdiction would be to distort the meaning of the locality test beyond what reason and policy would suggest or require.

the negligence of her owners or mariners; and that, as there was no negligence of the ship in the present case, the tort was not maritime. This view we deem to be altogether too narrow." *Id., supra*, at p. 61. Moreover, in Wilson v. Transocean Airlines, 121 F. Supp. 85 (N. D. Calif. 1954), a case arising under the Federal Death on the High Seas Act, 46 U. S. C. A. § 761, and involving the crash of an aircraft at sea, it was stated that: "Admiralty tort jurisdiction has never depended upon the nature of the tort or how it came about, but upon the locality where it occurred . . . . Locality has remained the sole test of admiralty tort jurisdiction despite recurring expressions of doubt whether the tort must not also bear some relation to the operation of a vessel." *Id., supra*, at p. 92.

Assuming *arguendo* that some kind of maritime nexus in addition to locality is required as a prerequisite to admiralty tort jurisdiction, we believe nonetheless that the cases at bar are within the admiralty jurisdiction insofar as the tort claims alleged therein are concerned. At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce on or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across these same waters. When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels. "There can be nothing more maritime than the sea." Pure Oil Co. v. Suppes, 293 F. 2d 60, 65 at n. 6 (5 Cir., 1961).

Concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging. In Detroit Trust Co. v. The Thomas Barlum, 293 U. S. 21, 52 (1934), the Supreme Court, by Mr. Chief Justice Hughes, stated: "We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as, for example, they were aban-

doned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters." See also McGuire v. City of New York, 192 F. Supp. 866, 871 (S. D. N. Y. 1961)."[14]

An apt analogy to the situation at bar can be drawn, we conclude, from the cases construing the Federal Death on the High Seas Act, 46 U. S. C. A. § 761. The Act provides for a cause of action, in admiralty, for wrongful death occurring beyond one marine league from shore.[15] No reference to aircraft is made in the language of the Act.[16] Nonetheless, it has been held clearly that tort claims for wrongful death arising out of the crash of an aircraft on navigable waters beyond one marine league from shore are within the terms of the Act and cognizable in admiralty. See D'Aleman v. Pan American World Airways, 259 F. 2d 493 (2 Cir. 1958);[17] Wilson v. Transocean Airlines, 121

14. "It is proper that admiralty jurisdiction be extended where commercial necessity so dictates."

15. The libels in the cases on appeal do not allege that the death occurred beyond one marine league from shore. Therefore the Act is inapplicable.

16. "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."

17. "The purpose of the Act was to create a uniform cause of action where none existed before and which arose beyond the territorial limits of the United States or any State thereof. When the Act was passed (March 30, 1920) the only feasible way to be carried beyond the jurisdiction of any law applicable to wrongful death was by ship. However, with the development of the transoceanic airship the same extraterritorial situation was made possible in the air. . . . The statutory expression 'on the high seas' should be capable of expansion to, under, or, over, as scientific advances change the methods of travel. The law would indeed be static if a passenger on a ship were protected by the Act and another passenger in the identical location, three thousand feet above in a plane were not . . . ." D'Aleman v. Pan American World Airways, 259 F. 2d 493, 495 (2 Cir. 1958).

F. Supp. 85 (N. D. Calif. 1954); Lavello v. Danka, 175 F. Supp. 92 (S. D. N. Y. 1959); Noel v. Aeroponents, Inc., 169 F. Supp. 348 (D. N. J. 1958)[8]; King v. Pan American World Airways, 166 F. Supp. 136 (N. D. Calif. 1958), aff'd, 270 F. 2d 355 (9 Cir. 1959), certiorari denied, 362 U. S. 928 (1960); Fernandez v. Linea Aeropostal Venezolana, 156 F. Supp. 94 (S. D. N. Y. 1957)[9]; Lacey v. L. W. Wiggins Airways, Inc., 95 F. Supp. 916 (D. Mass., 1951); Choy v. Pan American Airways, 1941 A. M. C. 483 (S. D. N. Y.).

Prior to the Death on the High Seas Act, 46 U. S. C. A. 761, a tort, occurring beyond one marine league, which resulted in death did not give rise to a wrongful death claim upon which relief could be granted. Nonetheless, the tort may have been one within the jurisdiction of admiralty as delineated in the Constitution and implemented by 28 U. S. C. A. 1333. There is, of course, a clear and fundamental difference between jurisdiction and lack of it and failure to state a cause of action. See Wade v. Rogala, 270 F. 2d 280, 284 (3 Cir. 1959). The Act, as we have said, creates a cause of action which could not exist absent such a statute. It does not purport to create jurisdiction. See Fernandez v. Linea Aeropostal Venezolana, *supra*.[10] In

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18. ". . . [I]n the absence of a statute an action could not be maintained for death caused by negligence . . . To correct this situation death acts have been passed in nearly all jurisdictions. This still left a vacuum in the case of deaths which might result from accidents on the high seas. To allow actions to be maintained for deaths in this situation the Death on the High Seas Act was enacted." Fernandez v. Linea Aeropostal Venezolana, 156 F. Supp. 94, 96-97 (S. D. N. Y. 1957).

19. "The statute certainly includes the phrase 'on the high seas' but there is no reason why this should make the law operable only on a horizontal plane. The very next phrase 'beyond a marine league from the shore of any State' may be said to include a vertical sense and another dimension. Certainly what was actually intended was to give a right to damages for wrongful death where no state surely could give it but where only the the Federal Government could claim to extend its power. The phrase, we think, was wholly and only geographical." Choy v. Pan American World Airways, 1941 A.M.C. 483, 484 (S. D. N. Y.).

the appeals at bar the jurisdictional authority, 28 U. S. C. A. § 1333, is identical with that in the cases under the Death on the High Seas Act. The requisite statutory cause of action for wrongful death, however, is provided here by a state wrongful death act.[20] If, as it has been held, a tort claim arising out of the crash of an airplane beyond the one marine league line is within the jurisdiction of admiralty, then *a fortiori* a crash of an aircraft just short of that line but still within the navigable waters is within that jurisdiction as well. To hold otherwise would be to impose an illogical and irrational distinction on the operation of the broad grant of admiralty jurisdiction extended by the Constitution and implemented by 28 U. S. C. A. § 1333.

It is true that the libels in the cases on appeal allege, *inter alia*, negligence in the inspection and maintenance of the aircraft. These allegations refer to allegedly negligent acts committed on land for we cannot assume, in the absence of express averments to such effect, that maintenance of an aircraft or inspection thereof except for emergency purposes takes place in flight. Nonetheless, if the disastrous effects of failure to properly inspect or maintain the aircraft occurred on navigable waters, as was alleged in the instant cases, the tort claims must be deemed to be within the admiralty jurisdiction. In Lavello v. Danko, 175 F. Supp. 92 (S. D. N. Y. 1959), a case arising under the Death on the High Seas Act, the libel alleged that the crash of the aircraft at sea was proximately caused by failure to properly inspect and repair the aircraft on shore. The court held that the tort claims were within the juris-

20. As we have said, the Death on the High Seas Act, 46 U. S. C. A. § 761, is not applicable in the cases on appeal. Nonetheless, a statutory cause of action for wrongful death may well exist. Where the death occurs on navigable waters within the territorial jurisdiction of a state, as here, state wrongful death statutes would be operative in the admiralty courts. Hess v. United States, 361 U. S. 314 (1960); The Tungus v. Skovgaard, 358 U. S. 588 (1959); Levinson v. Deupree, 345 U. S. 648 (1953); Western Fuel Co. v. Garcia, 257 U. S. 233 (1921); The H. S., Inc., No. 72, 130 F. 2d 341 (3 Cir. 1942).

diction of admiralty. "Even if the tortious conduct . . . occurred within the territorial limits of this State, if the impact of the tortious conduct took place . . . over the high seas then this [admiralty] Court has jurisdiction . . . .", *id., supra*, at 93. See Noel v. Airponents, Inc., 169 F. Supp. 348 (D. N. J. 1958). In Wilson v. Transocean Airlines, Inc., 121 F. Supp. 85, 92 (N. D. Calif. 1954) the court said: "In applying the 'locality' test for admiralty jurisdiction, the tort is deemed to occur, not where the wrongful act or omission had its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action." See also Lacey v. L. W. Wiggins Airways, Inc., 95 F. Supp. 916 (D. Mass. 1951); Fireman's Fund Ins. Co. v. City of Monterey, 6 F. 2d 893 (N. D. Calif. 1925); Thomson v. Bassett, 36 F. Supp. 956 (W. D. Mich. 1940); City of Lincoln, 25 Fed. 835 (S. D. N. Y. 1885).

The respondents argue that the Federal Aviation Act of 1958, 49 U. S. C. A. § 1301 *et seq.* (1962 Supp.), precludes the exercise of admiralty jurisdiction as to aircraft crashes in navigable waters. 49 U. S. C. A. § 1509 (a) provides in pertinent part that "[T]he navigation and shipping laws of the United States . . . shall not be construed to apply to seaplanes or other aircraft . . . ." The brief correct answer to this contention is that the Federal Aviation Act is not a statute intended either to create or to limit judicial jurisdiction. "The principal purpose of this legislation is to establish a new Federal agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations." 1958 Cong. & Admin. News 3741. In Wilson v. Transocean Airlines, 121 F. Supp. 85, 93 (N. D. Calif. 1954), the argument herein urged by the respondents was raised and rejected, the court stating: "The term 'navigation and shipping laws' . . . obviously refers to those federal laws specifically governing the navigation and operation of the merchant marine. The term was never intended

to include a general admiralty statute . . . ." With reference to the predecessor to the 1958 Act, the Air Commerce Act of 1926, 44 Stat. 568, which contained the same language as the pertinent section in the Federal Aviation Act of 1958, Benedict states: "It will be noted that the Act does not go so far as to deny the existence of admiralty and maritime jurisdiction generally over aircraft . . . ." 1 Benedict, Admiralty § 58, at pp. 118-119 (6th ed.). See also Choy v. Pan American Airways, 1941 A. M. C. 483, 485 (S. D. N. Y.).

We are of the opinion for the reasons stated that the tort claims *sub judice* lie within the admiralty jurisdiction of the court below.

The claims involving breach of contact and of warranty in the appeals at bar present a different situation. See note 2, *supra*. Admiralty jurisdiction over contracts is dependent upon the subject matter of the contract. The test is very different from that applicable in respect to tort claims. State Industrial Comm'n v. Nordenholt Co., 259 U. S. 263 (1922).[21] "[It] is settled that the contract articulated in a libel must be, directly and in essence, an obligation maritime in its nature, for the performance of maritime service or transactions, to confer jurisdiction." Pacific Surety Co. v. Leathani & Smith Towing Co., 151 Fed. 440, 443 (7 Cir. 1907). See also James Richardson & Sons v. Connors Marine Co., 141 F.2d 226 (2 Cir. 1944); Philadelphia, Wilmington & Balto. R. R. v. Philadelphia & Havre De Grace Steam Towboat Co., 64 U. S. (23 How.) 209 (1859). It is clear, we believe, that a contract or warranty relating to the airframe or power plant of a land-based aircraft and a contract of carriage by air between two cities

21. "In determining whether a contract be of maritime nature, locality is not controlling, since the true test is the subject matter of the contract—the nature and character of the work to be done . . . . In torts the rule is different. There, jurisdiction depends solely upon the place where the tort was committed . . . ." State Industrial Comm'n v. Nordenholt Co., *supra*, at 271. See also Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469 (1922).

on the United States mainland are not maritime in substance, nor are such contracts and warranties made maritime by virtue of the fact that the aircraft in question flew briefly over navigable waters en route from Boston to Philadelphia.[22] Admiralty jurisdiction in tort attaches only if the consummation of a wrongful act or acts occurs within the territorial limits of that jurisdiction, that is to say, within navigable waters. But it does not necessarily follow from this that the entire flight and everything connected with it is maritime as well.

We hold, therefore, that tort claims arising out of the crash of a land-based aircraft on navigable waters within the territorial jurisdiction of a state are cognizable in admiralty. We further hold, however, that contracts and warranties referring to the entire portion of the flight of a land-based aircraft from one mainland city to another are not justiciable in admiralty notwithstanding the fact that their breach is alleged as the result of a crash into navigable waters traversed as a segment of a primarily over-land flight.

Accordingly, the judgments of the court below will be reversed as to the tort claims alleged but affirmed as to the contract and warranty claims. The cases will be remanded for further proceedings as the facts and law may require.

---

22. We, of course, do not decide whether such contracts would be maritime in substance were the aircraft involved a trans-Atlantic carrier en route from Boston to, for example, Shannon, Ireland.

APPENDIX C.

Order of the United States Court of Appeals For the Third Ciruit.

(In No. 14,023.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,023

DOROTHY WEINSTEIN, EXECUTRIX OF THE ESTATE OF RALPH WEINSTEIN, DECEASED,
Appellant,

v.

EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION AND LOCKHEED AIRCRAFT CORPORATION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present BIGGS, *Chief Judge*; and STALEY, *Circuit Judge*; and LEAHY, *District Judge*.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed as to the tort claims alleged, but affirmed as to the contract and warranty claims; and the case remanded for further proceedings as the facts and law may require.

Attest:

IDA O. CRESKOFF,
Clerk.

April 26, 1963.

[Orders in Nos. 14024, 14025, 14026, 14027, 14028, and 14029 are identical.]

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963.

No. 276.

EASTERN AIR LINES, INC.;
GENERAL MOTORS CORPORATION and
LOCKHEED AIRCRAFT CORPORATION,

Petitioners,

v.

DOROTHY WEINSTEIN, Executrix, etc.,
MARY B. GRICE, Executrix, etc.,
DIANE BRAFF, Admx., etc.,
THELMA P. FREEMAN, Executrix, et al., etc.,
EDNA E. LONG, Admx., et al., etc.,
ATTILIO E. ABATE, Admr., etc.,
JOSEPH THOMPSON, JR., Admr., etc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No.

EASTERN AIR LINES, INC.,
GENERAL MOTORS CORPORATION AND
LOCKHEED AIRCRAFT CORPORATION,
Petitioners,

v.

DOROTHY WEINSTEIN, EXECUTRIX, ETC.,
MARY B. GRICE, EXECUTRIX, ETC.,
DIANE BRAFF, ADMX., ETC.,
THELMA P. FREEMAN, EXECUTRIX, ET AL., ETC.,
EDNA E. LONG, ADMX., ET AL., ETC.,
ATTILIO E. ALATE, ADMR., ETC.,
JOSEPH THOMPSON, JR., ADMR., ETC.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Appendix A, Petitioners' Brief) is reported sub nom. as *Weinstein v. Eastern Air Lines, Inc.* at 206 F. Supp. 430 (E. D. Pa., 1962). The opinion of the Court of Appeals for the Third Circuit reversing in part and affirming in part, (Appendix B, page 9(a) of Petitioners' Brief) is reported at 316 F. 2d 758 (April 26, 1963).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED.

I. The decision of the court below upholding the right to sue in admiralty for injuries and deaths resulting from the crash of an airplane in navigable waters conforms with the established principles of tort jurisdiction, and is not in conflict with decisions of other appellate courts.

II. Tort jurisdiction in admiralty encompasses a right to recover for a breach of the warranty of fitness.

STATEMENT OF THE CASE.

On October 4, 1960, a Lockheed Electra airplane took off from the Logan International Airport in Boston, Massachusetts, en route to Philadelphia, Pennsylvania. Shortly thereafter it crashed into the navigable waters of Boston Harbor as the result of which most of the passengers and crew members lost their lives. The survivors, in addition to suffering injury from the impact, were subjected to injury and exposure extricating themselves from the submerged aircraft and being rescued from the water.

REASONS WHY THE PETITION SHOULD BE DENIED.

The Decision of the Court Below Upholding the Right to Sue in Admiralty for Injuries and Deaths Resulting From a Crash of an Airplane in Navigable Waters Conforms With the Established Principles of Tort Jurisdiction and Is Not in Conflict With Decisions of Other Appellate Courts.

A. The Decision of the Court Below Affirms the Traditional and Established Locality Test of Tort Jurisdiction in Admiralty.

Since the adoption of the Constitution ample opportunity has been presented for the interpretation and construction of Article III, which provides that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." As the result, the general limits of admiralty jurisdiction have been definitively fixed from time to time by this court.

In conferring upon the United States courts "all cases of admiralty and maritime jurisdiction" with no limitation of that grant except that contained in the very definition of the words, the founding fathers indicated the broad scope of the jurisdictional grant intended, and manifested the first clear extension of admiralty jurisdiction.

In *De Lovio v. Boit*, 7 Fed. Cas. 418, 419, 432, 441, 444 (No. 3776) (C. C. D. Mass., 1815), a polestar in the firmament of judicial decisions, Mr. Justice Story traced the history of admiralty jurisdiction in England before the adoption of the Constitution, and determined that the jurisdiction of that court, as delimited and narrowed by the Court of the King's Bench, had been rejected by our founding fathers. Instead, he ascribed sweeping terms to the constitutional scope of jurisdiction. At p. 441:

"What is the true interpretation of the clause 'all cases of admiralty and maritime jurisdiction?' If we examine the etymology, or received use, of the words 'admiralty' and 'maritime jurisdiction', we shall find, that they include *jurisdiction of all things done upon and relative to the sea*, or, in other words, all transactions and proceedings relative to commerce and navigation, *and to damages and injuries upon the sea*." (Emphasis supplied.)

At p. 44:

"On the whole, I am, without the slightest hesitation, ready to pronounce, that the delegation of cognizance of 'all civil cases of admiralty and maritime jurisdiction' to the courts of the United States comprehends all maritime contracts, torts and injuries. *The latter branch is necessarily bounded by locality*." (Emphasis supplied.)

His views were accepted by this Court in *Waring v. Clarke*, 46 U. S. 441 (1847) and *Philadelphia, Wilmington and Baltimore R. R. Co. v. Philadelphia and Havre de Grace Steam Tow Boat Co.*, 64 U. S. 209 (1860).

In *The Plymouth*, 70 U. S. (3 Wall.) 20, 37 (1865) the specifications of the locality jurisdiction of the Admiralty Court over torts were set forth:

". . . The wrong or injury complained of must have been committed wholly upon the high seas or navigable waters, or at least, the substance and consummation of the same must have taken place upon these waters."

Further:

"The jurisdiction of admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. *Every species of tort, how-*

> *ey or occurring and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.*" (Emphasis supplied.)

The Plymouth, therefore, definitely announced locality as the sole test for jurisdiction in tort. On the other hand, in *Insurance Company v. Dunham*, 11 Wall. 1, 20 L. Ed. 90 (1871), this court held that the test for jurisdiction in contract is the nature of the subject matter involved. Accordingly, in construing the congressional grant of admiralty and maritime jurisdiction it was determined that this jurisdiction is comprised of two types of cases: (1) those involving acts committed on the high seas or other navigable waters; and (2) those involving contracts and transactions connected with shipping employed on the seas or navigable waters. In the first category jurisdiction is determined by the locality of the substance of the injury, while in the second category the subject matter is the primary determinative factor. See The Constitution of the United States, Analysis and Interpretation, U. S. Government Printing Office, p. 574 (1953).

The locality test has been unqualifiedly pronounced by this Court as the criterion for tort jurisdiction in admiralty. *Gabone, Dubuque, Dunleith & Minn. Packet Co. v. Rock Island Bridge*, 73 U. S. 213, 215 (1867); *Panama R. R. v. Napier Shipping Co.*, 166 U. S. 280 (1897).

In *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 59-60 (1914), an attack was made upon the jurisdiction along the same lines as contended by petitioners. Despite the fact that the court avoided the issue, it strongly endorsed the locality test, stating:

> "This rule—that locality furnishes the test—has been frequently reiterated, with the substitution (under the doctrine of The Genesee Chief, 12 How. 443), of navigable waters for tide waters. Thus, in the case of the Philadelphia, Wilmington & Baltimore R. R. Co. v. The Philadelphia & Havre de Grace Steam Towboat

Co., 23 How. 209, 215, the court said: 'The jurisdiction of courts of admiralty in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality.' Again, in the case of The Plymouth, 3 Wall. 20, where jurisdiction was denied upon the ground that the substance and consummation of the wrong took place on land and not on navigable water, the court said, p. 35: 'The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters. A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. . . . The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however, occurring and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.'

. . . . . "

Further, the Court deemed the contention that there must be some connection with a vessel in order to attain maritime jurisdiction "altogether too narrow," 234 U. S. at page 61.

Following *Imbrovek*, a number of Supreme Court decisions referred to locality as the sole test for jurisdiction *Industrial Comm. v. Nordenholt Corp.*, 259 U. S. 263 (1922); *Western Fuel v. Garcia*, 257 U. S. 233 (1921). This was likewise true with inferior courts. See *Keator v. Rock Plaster Mfg. Co.*, 256 F. 574 (S. D. N. Y., 1919); *Netherlands American S. N. Co. v. Gallagher*, 282 F. 171 (C. A. 2, 1922); *Port of New York Stevedoring Co. v. Castagna*, 280 F. 618, 623 (C. A. 2, 1922); *Bureo v. Southern Pacific Co.*,

59 F. 2d 407, 408 (C. A. 9, 1931). The generality of the language employed by the court, following *Imbrovek*, would of itself be sufficient to show that it regarded locality as the sole test for jurisdiction. However, it is not necessary to rely upon general statements. In *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, 476 (1922), the lower court asked the Supreme Court for instructions concerning admiralty jurisdiction in the case of a carpenter injured while at work on board a new vessel which was as yet incomplete, but which had been launched in navigable waters. Mr. Justice McReynolds summarily answered this question when he stated:

> "The general doctrine that . . . admiralty jurisdiction depends . . . in tort matters, upon the locality, has been so frequently asserted by this court that it must now be treated as settled."

The significance of this ruling is manifested by the fact that under all rules of jurisdiction in contract since Rohde was working on an unfinished ship which was not as yet a vessel, his employment was not maritime in nature, and therefore the only conceivable justification for maritime jurisdiction was the fact that the accident occurred upon the navigable waters.

In *Fireman's Fund Ins. Co. v. City of Monterey*, 6 F. 2d 893 (N. D. Cal., 1925), a wharf, which then was a non-maritime object for jurisdictional purposes, was caused to collapse. As a result, a large number of cases of canned sardines which were stored on the wharf were precipitated into the navigable waters of Monterey Bay. The Court ruled that this case was one of proper admiralty cognizance and in so doing stated:

> ". . . The general rule is that 'the test of jurisdiction in matters of tort is the locality.' Hughes, Admiralty (2d Ed.) Sec. 36. Here it is admitted that all the acts and omissions of respondent took place on land, since the wharf in relation to which they occurred

is considered in law as land. Hughes (2d Ed.) Sec. 198, and cases cited; The Plymouth, 70 U. S. (3 Wall.) 20, 18 L. Ed. 125. But, as no actual damage to the goods was inflicted until they were thrown or fell into the water, it is asserted that the locality of the injury, the Bay of Monterey, which admittedly is within the jurisdiction of a court of admiralty."

A similar ruling had been made in *The City of London*, 25 Fed. 835 (S. D. N. Y., 1885), wherein a wharf loaded with steel blooms gave way, throwing the blooms into the water. Jurisdiction of the admiralty court was attacked on the grounds that the negligence alleged was a tort committed upon the wharf. It was held there that the admiralty did have jurisdiction as the consummation of the tort was in the water. *Cf. Vancouver S. S. Co. v. Rice*, 288 U. S. 445 (1933); *Ringie v. Port Huron Terminal Co.*, 295 U. S. 647 (1935).

In *Dyer v. Chesapeake Bay Ferry District*, 158 F. Supp. 408, 409 (E. D. Va., 1958), a passenger on a ferry that was sailing in navigable waters was held to have a right to maintain an action in admiralty against a bus company for the alleged negligence of the bus company's operator in permitting the bus to roll against her after the bus had boarded the ferry. Obviously the bus was not a maritime object and the basis for jurisdiction was the locality of the tort.

In *50,000 Feet of Timber*, 9 Fed. Cas. 47 (4758) (D. Mass., 1871), salvage was allowed on rafts of timber found floating in Boston Harbor. In reaching this decision Judge Lowell remarked that it would be no defense "that the goods had been washed out to sea from shore by gale or flood or hail or dropped from a balloon." (Emphasis ours.) And in *Brock v. \$2,1[illegible]*, 72 F. Supp. 115 (E. D. N. Y., 1947), id. 78 F. Supp. 635 (1948), where a boatman recovered a wallet from a corpse floating in New York Harbor, the court sustained a libel in rem for salvage, stating that the test was whether it was a "moving thing sus-

ceptible of being lost and saved within the local jurisdiction of admiralty".

More recently this Court has reaffirmed the locality test in *Kermarec v. Compagnie Generale Transatlantique*, 358 U. S. 625, 628 (1959), and *Hess v. United States*, 361 U. S. 314 (1960), where these words were used. (p. 318 Footnote 7):

> "There can be no question but that Oregon would be required to apply maritime law if this was an action between private parties, since a tort action for injury or death occurring upon navigable waters is within the exclusive reach of maritime law. The Plymouth (Hough v. Western Transp. Co.) (U. S.) 3 Wall. 20, 35, 36."

Further support for the locality test can be gleaned from the Death on the High Seas Act cases involving airplanes. An action based upon the Death on the High Seas Act is properly brought in admiralty. 41 Stat. 537, 46 U. S. C. 761-768 (1920). While that Act affords admiralty jurisdiction in deaths resulting more than a marine league from shore, it is significant that it nowhere states that it is to apply to air travel. While it is now undisputed that the Death on the High Seas Act applies to deaths resulting from the crash of airplanes at sea, *National Air Lines v. Stiles*, 268 F. 2d 400 (C. A. 5, 1959), cert. denied, 361 U. S. 885, it was originally contended that there was no admiralty jurisdiction in such cases on the basis of non maritime object. In *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 86-87 (N. D. Cal., 1954), the Court dealt with this issue and determined that jurisdiction would apply by means of the locality test. In this regard the Court stated:

> "Admiralty tort jurisdiction has never depended upon the nature of the tort or how it came about, but upon the locality where it occurred. . . . Locality

has remained the sole test of admiralty tort jurisdiction despite recurring expressions of doubt whether or not the tort must also bear some relation to the operation of the vessel.

"In applying the locality test for admiralty jurisdiction, the tort is deemed to occur, not where the wrongful act or omission has its inception but where the impact of the act or omission produced such injury as to give rise to the cause of action (citing cases). Insofar as it appears from the complaint in this action the wrongful act charged to defendant produced no actionable injury until the aircraft plunged into the sea. The tort occurred upon the high seas within the admiralty jurisdiction. If it is assumed arguendo that the air space over the high seas is without the admiralty jurisdiction, this case is analogous to those in which persons or property are precipitated from the land into the sea as a result of a wrongful act or omission. In such cases, if there is no impact upon the person or property before they strike the water, it is recognized that the tort occurs upon the water within the admiralty jurisdiction."

See further *Blumenthal v. United States*, 189 F. Supp. 435, 445 (E. D. Pa., 1960), aff'd, 306 F. 2d 16 (1962); *cf. D'Aleman v. Pan American Airways*, 259 F. 2d 493, 496 (C. A. 5, 1959).

In *O'Donnell v. Great Lakes Dredge and Dock Co.*, 318 U. S. 36, (1943) this Court took cognizance of the locality test as follows (p. 40):

"It is true that the jurisdiction in admiralty in cases of tort or collision is in general limited to events occurring on navigable waters. . . ."

Then went on to say that Congress under the Jones Act, 41 Stat. 1007, Ch. 250, § 33, 46 U. S. C. § 688, had the power to enlarge the rights and remedies of a seaman, which

afforded O'Donnell the right to recover despite the fact he was injured on-shore.

The *O'Donnell* decision bespoke of a consistent trend in the expansion of jurisdictional concepts in admiralty. By legislation, as in the Jones Act and the Admiralty Extension Act, 52 Stat. 496, 46 U. S. C. § 479 (1948) which broadened the scope of jurisdiction to include certain amphibian torts, howbeit not eliminating locality as a standard. *Fematter v. City of Los Angeles*, 196 F. Supp. 89, 91 (S. D. Cal. 1961). And by the courts in acknowledging that a tort arising out of a maritime status or relation is cognizable by the maritime law whether it arises on sea or on land. *Strika v. Netherlands Ministry of Traffic*, 185 F. 2d 555 (C. A. 2, 1950), cert. den., 341 U. S. 904; *Gutierrez v. Waterman Steamship Corp.*, 373 U. S. 206 (1963). Surely this enlargement of jurisdiction did not diminish the effect of locality.

It is now well established that there are three bases of admiralty jurisdiction: (1) locality; (2) maritime contract; (3) maritime status or relation, and so long as any one of these jurisdictional tests are satisfied, the admiralty court has jurisdiction. The locality test applies irrespective of the nature of the origin of the wrong or injury, or of the maritime character of the instrument of injury, or of the relation borne by the wrong done to a vessel, so long as the substance of the injury occurs upon navigable waters. It is a simple, all-inclusive formula, free from the perplexities which have plagued jurisdiction over contracts where in each instance there is a necessity of deciding whether a maritime relation exists.

B. *The Decision of the Court Below Is Not in Conflict With the Decision of Other Appellate Courts.*

In an effort to show a conflict exists between the various circuits, the petitioners have confused locality jurisdiction with the jurisdiction which admiralty exercises over

torts affecting parties in a maritime relation. Neither *Castillo v. Argonaut Trading Agency*, 186 F. Supp. 398 (S. D. N. Y., 1957), nor *Forgione v. United States*, 202 F. 2d 249 (C. A. 3, 1953), cert. denied, 345 U. S. 966, involved torts which were consummated upon navigable waters. Both cases deal with the arrest and imprisonment of crew members which took place on shore. In the *Castillo* case, the crew members were aliens whose wrongful imprisonment was alleged to have been caused by the officers and agents of the vessel as a result of a disagreement over conditions on board the vessel. The court held there was a direct relationship to the operation of the vessel and the cause to be within the admiralty jurisdiction. In effect the Court determined that the locality test of jurisdiction was too restrictive and not exclusive. In the *Forgione* case the Court was concerned with American seamen. It found that the arrest and imprisonment did not fall within the purview of the Jones Act, and inasmuch as the situs of the tort was on shore it was non-maritime and not within the admiralty jurisdiction. Whatever conflict might exist between these decisions does not relate to the jurisdiction of admiralty to adjudicate a cause which arises on navigable waters. Therefore, it can be fairly stated that this citation does not imply any opposition to the decision of the court below.

The conflict which the petitioners would attribute to the Ninth Circuit through *Campbell v. H. Hackfeld & Co.*, 125 F. 693 (1903) has no merit. That decision was specifically rejected by this Court in *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52 at 57-62, and therefore has no authoritative vitality.

The sole remaining decision cited by petitioners in opposition is *McGinty v. City of New York*, 192 F. Supp. 866 (S. D. N. Y. 1961). This decision was reviewed by the court below. It will be noted that the maritime situs of this tort is questionable, footnote 13, Appendix B, p. 16a.

We submit, therefore, that the petitioners have failed to demonstrate a conflict exists between the decision of the court below and the Courts of Appeal of other Circuits.

C. The Crash of an Airplane Upon Navigable Waters Has Essential Maritime Characteristics.

It is well settled that where the origin of the tort is on shore but the sum and substance of the injury is upon navigable waters, it is within the admiralty jurisdiction. *Vancouver S. S. Co. v. Rice*, 288 U. S. 446, 448; *Hess Altmr. v. United States*, *supra*, p. 319; *Wilson v. Transocean Airlines*, *supra*, p. 92; *Lacey v. L. B. Wiggins Airways, Inc.*, 95 F. Supp. 916 (D. C. Mass., 1951); *Noel v. Airponents, Inc.* (D. N. J. 1958), 169 F. Supp. 348, 350; *Middleton v. United Aircraft Corp.* (D. C. N. Y.), 204 F. Supp. 856, 857.

The sum and substance of injury occurs in a plane crash, when it falls and sinks into the water, striking any surface craft and undersurface craft or other objects while it plunges to a point of temporary or permanent repose, depending upon such vagaries as the depth of the water, and the forces of wind, tide and current. The resulting plight involves personal injury, escape and rescue as distinct from a crash ashore as the liquid state of the water differs from solid earth. Depending upon the proximity of the site of the crash to shore the sunken plane may constitute an obstruction to maritime commerce. Goods which float away are the object of flotsam, and the plane and its contents the object of salvage. *Lukes Bros. Steamship Co., Inc. v. Elvina Boat No. 3*, 155, 5 Avi. 17314 (D. C. S. D. Cal., 1957); *Lombros Seaplane Base, Inc. v. The Batory*, 215 F. 2d 228, 232-233 (C. A. 2, 1954). See also, Gilmore and Black, Law of Admiralty (1957) at p. 459. The contract to remove the wreck unquestionably would be maritime in nature as is any contract to remove a structure menacing navigation. See D. M. *Picton & Co. v. Eastes*, 160 F. 2d 189 (C. A. 5, 1947), cert. den., 331 U. S. 859. If surface or below surface craft are struck by the falling plane principles of collision

would be called into play with possible recourse to limitation of liability, and, depending upon the nationality of the craft involved, conceivable problems of international law and treaties.

The mobile character of a vessel is shared by the airplane. It invariably travels over bodies of navigable waters in the course of transportation, and in intercontinental transit it does so for most of the passage. If the crash occurs beyond a marine league from shore the next of kin of the victims have access to the Admiralty Court under the Death on the High Seas Act. There is no justification for denying equal access because the crash occurs close to shore. Certainly, the substitution in such a case of the remedy of a State death statute for the ones under the federal statute does not affect admiralty jurisdiction. *Hess, Admr. v. United States*, 361 U. S. at p. 318.

Interstate and foreign commerce are common to these instrumentalities of transportation, and it serves the national interest to have disputes relative to such transportation adjudicated in the federal courts. Canfield, The Uniformity of Maritime Law, 24 Mich. L. Rev. 544, 555 (1926); Story's Commentaries on the Constitution, 614, 617-618. In the case of the crash of an airplane upon navigable waters this can best be done by a court of admiralty competent to apply uniform and flexible procedures and to adjudicate every phase of the litigation arising out of such an occurrence.

There has been no expression of any jurisdictional conflict in the policy of Congress towards these two types of commerce. The purpose of the Federal Aviation Act of 1958, 72 Stat. 737, et seq., 49 U. S. C. Secs. 1301-1542 was to establish a new federal agency with powers adequate to enable it to provide for the safe and effective use of navigable airspace by both civil and military carriers and to deal with such problems as the overcrowding of air space and the development of airport facilities. See 1958 U. S. Code Congressional and Administrative News 3741.

43. There is nothing in that legislation, or in its forerunner, the Air Commerce Act of 1926, 44 Stat. 568, et seq., 49 U. S. C. 171 et seq., to suggest an intention to delimit the constitutional grant of jurisdiction or to deny the existence of admiralty and maritime jurisdiction generally over aircraft actually navigating or at rest in navigable waters. *Chow v. Pan American Airways, Inc.* (S. D. N. Y.), 1941 AMC 483, 485.*

TORT JURISDICTION IN ADMIRALTY ENCOMPASSES A RIGHT TO RECOVER FOR A BREACH OF THE WARRANTY OF FITNESS.

Should this Court grant certiorari to the petitioners, the jurisdiction of the courts of admiralty to adjudicate rights and obligations arising from implied warranties should be clarified.

The general maritime law has retained vitality by the judicial process of adopting rules which meet the requirements of a dynamic society in its commerce upon and over the seas. As the principles of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916), were construed to become a part of the general law of torts, maritime as well as common law by the court in *Sieracki v. Seas Shipping Co., Inc.*, 149 F. 2d 98, 99-100 (C. A. 3, 1945), affirmed 328 U. S. 85, and in *Dunn v. Wheeler Shipbuilding Corp.*, 86 F. Supp. 659, 660-661 (E. D. N. Y., 1949), due recognition should also be given to the development of that law as it relates to implied warranties.

Two defects in the present state of the law have become apparent. First, the difficulty of proving negligence in many cases where it exists under the *MacPherson* rule,

* It is significant to note that the international *Convention on the Territorial Sea and the Contiguous Zone*, adopted by the U. N. Conference on the Law of the Sea, April 29, 1958 (U. N. Doc. A/Conf. 13/L. 53) provides in Part I, Section I, Article 2 the following:

"The sovereignty of a coastal state extends to the air space over the territorial sea as well as to its bed and subsoil." Thus recognizing the necessity of identity of jurisdiction.

Secondly, the growing awareness that social policy demands that the burden of accidental injuries caused by defective chattels be placed upon the producer as the one best able to distribute the risk to the general public. Prosser, Torts, 506-511 (2d Ed. 1955); 2 Harper & James, Torts, § 28.16. These defects have been given remedy by enlightened courts in stripping the contractual trappings of privity from "warranty" action, thereby raising the rule of *MacPherson* to the level of strict tort liability. Thus has emerged a species of liability without regard to either elements of privity or negligence. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N. J. 358; 161 A. 2d 69 (1961); Annotation, 75 A. L. R. 2d 39. As is often the case, developments of the common law are often at first not clearly articulated. It was for the jurisdiction which spawned *MacPherson* to enunciate that breach of warranty is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a non-contracting party whose use of the warranted article was within the reasonable contemplation of the manufacturer or vendor. *Goldberg v. Kollsman Instrument Co.*, 12 N. Y. 2d 432, 191 N. E. 2d 81, 8 Ave. Cas. 17629. (1963). The tortious character of breach of warranty has already been recognized in *Middleton v. United Aircraft Corporation*, 204 F. Supp. 856 (S. D. N. Y., 1960) in a proceeding under the Suits in Admiralty Act. We submit that in the context of an injury occurring in or upon navigable waters such implied warranty is justiciable in admiralty.

CONCLUSION

Petitioners' application for writ of certiorari should be denied because: (1) the court below properly applied the traditional and established rule of the locality test of jurisdiction; (2) there is no conflict between the decision of the court below and that of any other appellate court; (3) the crash of an airplane in navigable waters is a matter of maritime concern; (4) the problems of interstate and

foreign commerce adherent in such a disaster are best handled by a federal court sitting in admiralty with the competence to dispose of every phase of the litigation which might arise from the maritime situs of the tort; (3) Congress has shown no disposition to question the constitutional grant of jurisdiction in Admiralty as it might affect aviation.

Respectfully submitted,

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